PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
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PIKES & VEREKERS' NEWS

We are pleased to announce that Alistair Knox and Tom Bush have joined the firm as Solicitors in our Planning and Local Government practice. Alistair and Tom were previously working at the Land and Environment Court.

COSTS AGAINST COUNCIL IN A CLASS 1 APPEAL FOR UNREASONABLE CONDUCT

***Dunford v Gosford City Council (No 3)* [2015] NSWLEC 96 – Sheahan J**

In these proceedings an order for costs was sought by the successful applicant against the unsuccessful respondent council. The order was sought on the basis of the council's conduct leading up to the commencement, as well as its conduct in the proceedings.

The substantive proceedings followed a long history of seeking development consent through a proposal that was refused, despite being entirely compliant with the relevant Development Control Plan provisions in respect of coastal erosion. It was submitted by the applicant that the council sought to disavow its own planning controls and sought to apply an arbitrary approach. Further, the council consistently refused earlier applications which were entirely compliant.

In respect of the council's conduct in the proceedings, it was submitted that it was unreasonable as there was no clear evidentiary basis to justify the departure from the stated controls within adopted policies.

Rule 3.7 of the Land and Environment Court Rules 2007 provides that the Court is not to make an order for costs against a party in a Class 1 appeal unless it is "fair and reasonable in the circumstances". Some circumstances listed within r 3.7(3) include:

(a) a question of law that was a central issue in the proceedings;

(b) failure to provide, or delay in providing, information or documents;

(c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings;

(d) that a party has acted unreasonably in the conduct of the proceedings;

(e) that a party has commenced or defended the proceedings for an improper purpose; and

(f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where there were no reasonable prospects of success.

In holding that an order for costs was justified, the Court agreed that the circumstances formed unreasonable conduct leading to the commencement of, and during, the conduct of the proceedings under r 3.7(3)(c) and (d), and also (f), in respect of the continued defence of the proceedings.

For enquiries about this judgment, please contact Gary Green or James Fan.

***Brindley v Parramatta City Council* [2015] NSWLEC 1160 – Registrar Gray**

In these proceedings, the Registrar of the Land and Environment Court held that the successful applicant was entitled to part of its costs of conducting a Class 1 appeal. The Court held that the respondent council's conduct in defending the proceedings was unreasonable in that it did not put forward any expert evidence in support of its contention that the proposal was unacceptable due to social impacts.

Also, the council was unreasonable in raising a further contention that could never have been accepted as a basis for refusal.

The Registrar referred to the decision of Chief Justice Preston in *Telstra v Hornsby Shire Council* [2006] NSWLEC 285 where His Honour stated:

> *A consent authority's decision to oppose an appeal by an applicant against the consent authority's determination and the grounds on which to maintain opposition* ***should be based on probative evidence and on reason****. If there is no probative evidence in support of an issue, and a decision to refuse consent to a development application cannot be reached by a process of logical reasoning on probative evidence, the consent authority, as a reasonable public body, ought not to raise or maintain such an issue or raise or maintain a position that development consent should be refused by the Court.* [our emphasis]

The Registrar held that the contentions raised in the council's Amended Statement of Facts and Contentions, and pressed at the hearing, were not based on probative evidence **or** reason.

For enquiries about this case, please contact Ryan Bennett or Joshua Palmer.

LAND AND ENVIRONMENT COURT REFUSES TO MAKE CONSENT ORDERS

***Anderson v Council of the City of Sydney (No. 2)* [2015] NSWLEC 1144 – O'Neill C**

This judgment was delivered some weeks prior to the two decisions referred to above. The presiding Commissioner refused to make Consent Orders granting development consent for a private roof terrace on a residential flat building which was a contributory item in the Elizabeth Bay and Rushcutters Bay Heritage Conversation Area. This was despite the council's experts (a planner and a heritage expert) being satisfied that the proposal (which had been amended since lodgement of the appeal) met its contentions warranting refusal.

The Commissioner (who had heritage qualifications) held that the proposed development would erode the contribution that the existing building made to the heritage significance of the Heritage Conservation Area. Accordingly, the appeal was dismissed.

For enquiries about this case, please contact Julie Walsh or Alistair Knox.

Pikes & Verekers Lawyers
Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au